No. 83-1399

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

MARSHALL L. PECINA,

Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY and BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT SANTA FE'S BRIEF IN OPPOSITION

RONALD A. LANE
(Counsel of Record)
JOHN J. FLEPS
80 East Jackson Boulevard
Chicago, Illinois 60604
(312) 347-2929

ROTH A. GATEWOOD
109 West Ninth Street
Topeka, Kansas 66612

Counsel for Respondent The Atchison, Topeka and Santa Fe Railway Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

Name	Occupation	Circumstances	Date Removed From Service	Date Reinstated	Remarks
Gardner, L L	Coach Cleaner	Theft of 6 cartons of sewer pipe from Frt Hse #1 - value $252.	7-25-73	Was not	Has not requested reinstatement.
Regalado, V	Frt Handler	Theft of mdse from trailers at Frt Hse #3.	10-25-75	Was not	Board Award #21687 dated 8-31-77 denied request for reinstatement.
Gibson, R J	Switchman	Theft of Government forms from 2 locomotives 7-6-77 & from 6 locomotives 7-7-77.	8-04-77	Was not	Took to Board on 7-27-78. No word as to action taken.
Alexander, I E	Engineman	Appropriated several pieces of 2 x 8 lumber on R/W.	8-14-67	1-19-68	Now active employe.
Middleton, D F	Sig Mntnr	Appropriated Company property, and unauthorized use of Co. vehicle.	8-31-67	Was not	Denied bid for reinstatement.
Warren, W L	Ewa Gang Labr	Appropriated 65 lbs. of copper wire from Company.	8-13-73	1-8-74	Removed again 4-7-76 account absent withou leave; reinstated 6-28-77, but never reported - resigned.
Pulley, R A	Brakeman	Stole blankets from Reading Room at Fort Madison 11-19-74.	11-21-74	Was not	Application was disapproved.
Hammond, E L)) - Reeves, C A)	Mach Oprs	Merchandise taken from a trailer at derailment site 6-5-77.	3-31-78	5-1-78	Excessive time lag between date of occurence & date of investigation & subsequent suspension to warrant on 30 days susnension.

Name	Occupation	Circumstances	Date Removed From Service	Date Re-instated	Remarks
Slaughter, M K	Exa Gang Labr-Truck Driver	Used Sfe Universal credit card to purchase gasoline for personal use in private auto.	12-5-77	7-17-78	Now active employe.
Cook, D J	Clerk	Manipulation of demurrage records favor of SW Forest Industries in return for employing son.	2-20-73	4-02-73	Granted a disability Annuity on 6-19-75.
Messick, H E)	Switchman	Misappropriation of foodstuffs & other items from property of patrons at Turner industrial area. (All in same investigation.)	1-15-74	6-25-74	Now active employe.
Sawka, J)	Switchman		1-15-74	6-25-74	Now active employe.
Rhoades, R P)	Switchman		1-15-74	6-25-74	Appl. for Disab. Ann.
Wilson, F)	Yd Engineer		1-15-74		Did not appear at investigation due to mental distress then was not located until letter dated 12-3-74 written to him at a Calif. address, advising him of re instatement. No word from him since.
White, C W	Trackman	Appropriated Company property.	1-18-74	Was not	Denied reinstatement.
Stroble, G D	Paint Gang Foreman	Applying paint to private residence during assigned hours of duty.	5-23-74	Was not	Later resigned on 8-9-76 Reinstatement denied. Stroble claimed injury, subsequent lawsuit, resigned.
Miller, M L)	Switchman	Removal & possession of lading from a revenue shipment in car AT 621449 on 10-1-2,74.	11-29-74	4-17-75	Now active employe.
Stubbs, D J)	Switchman		"	4-16-75	Now active employe.

Name	Occupation	Circumstances	Date Removed From Service	Date Re-instated	Remarks
Torres, L P	Exa Gang Fmn	Used Company credit card for purchasing gasoline for personal auto.	2-27-74	6-28-76	Now active employe.
Smith, F C	Mach Opr	Appropriated Company gasoline for personal use.	12-3-76	3-21-77	Now active employe.
Sizemore, C A	Trackman	Appropriated Company radio pakset.	5-23-77	Was not	Bid for reinstatement was denied.
Madsen, L J	D&B Foreman	Unauthorized & illegal use of Company credit card.	1-21-78	7-25-78	Now active employe. No investigation held. Signed waiver for dismissal.
Hopke, R L	Trackman	Appropriated considerable Company property, such as pipe wrenches, etc., for personal use.	6-26-78	Was not	General Chairman requested reinstatement on 8-25-78 - denied.
Redmond, P K	Brakeman	Appropriated and sold Company owned scrap iron.	8-29-78	Was not	Has not sought reinstatement yet.
Smith, T L	Engineman	Used Conductor K D Wendlandt's SS No. to secure lodging at Salina when he (Smith) was not entitled to lodging.	12-23-74	6-22-75	Now active employe.
Wendlandt, K D	Conductor	Gave Engineman Smith his SS No. to secure lodging at Salina, since Engr Smith not entitled to lodging.	12-26-74	2-05-75	Now active employe.
Burgess, W A	Trackman	Appropriated Company barbed wire while working on Company fence.	9-25-73	Was not	Still off - not reinstated, and we denied reinstatement.

Name	Occupation	Circumstances	Date Removed From Service	Date Reinstated	Remarks
Brown, J J	Trackman	Appropriated Company barbed wire while working on Company fence.	9-25-73	Was not	Still off - not reinstated. We denied him reinstatement. Public Law Board No. 1582 Award No. 51 also denied his claim for reinstatement.
Morgan, E L	Engineman	Appropriated Company diesel fuel for his personal use.	2-06-75	1-03-76	Now active employe
Smith, C R) Moore, J O) Abbott, G L)- Gray, G D) Wonsik, J F)	Eng Foreman Yardman Yardman Yardman Yardman	Appropriating lading & mdse from commercial shipments at Okla City between 4/7 and 4/17/74.	3-15-75	None were ever reinstated	Public Law Board No. 1652 Award No. 4, dated Nov. 30, 1976, denied the 5 men's claim for reinstatement.
Oliva, E A	Track Man	Appropriating & selling Company scrap & ballast from 7-6-74 to 12-27-74.	4-16-75	10-24-75	Now active employe.
Milton, G E	Track Man	Appropriated Company steel beams to use in remodeling his home.	11-14-75	4-13-76	Now active employe.
Talbert, K D	Brakeman	Appropriated Company property (locomotive) & operated on yard trackage at Sublette, Kansas, 8-12-76.	8-13-76		Sent letter by Supt. dated 1-6-77 advising of his reinstatement, but Talbert never responded.
Morgan, E O Jr	Student Man	Appropriated Company credit card for purchase of gasoline for personal auto.	5-13-77	9-30-77	

Name	Occupation	Circumstances	Date Removed From Service	Date Re-instated	Remarks
Morgan, H O Jr	Gang Foreman	Used Company credit card for use in purchasing gasoline for personal vehicle (2nd offense)			Formal investigation set for 9-13-78, but postponed. He resigned from service.
Winfield, P F	Machine Opr	Appropriated a Company Weedeater machine & one case of oil, and sold same to raise money for personal use.	4-28-78	7-3-78	Now active employe.
Pearsall, D R	Laborer-Mech.	Attempted to remove old switch box in B&B Bldg & use electrical switch box for personal gain, but received injury (electrical burn) to both hands.	12-26-75	12-14-76	Now active employe.
Lopez, B J	Trk Supvr	Appropriated several tools & various supplies & took to his farm near Maxwell, N.M.	2-06-76	8-02-76	Lopez was again removed from service on 9-21-77 as a result of reporting for duty after drinking several beers in a local bar at Raton in violation of Rule G. Was reinstated on 1-23-7(and is now an active employe.
Lopez, A D	Track Man	Used Company credit card to purchase gasoline for his personal vehicle on 11-3-77. Also claimed 8 hrs. worked on 10-7-77 when he was off duty that date.	2-01-78	7-05-78	Now active employe.

Name	Occupation	Circumstances	Date Removed From Service	Date Re-instated	Remarks
Pegay, W D	Trackman	Appropriated Company truck for personal use on 6-18-78, wrecked same to amount of $2,000. Investigation held 7-21-78.	7-21-78	Was not	Pegay did not show up for investigation, and has not been heard from since date of incident.
Martin, J W	Train Baggage-man	Appropriated several items from baggage cars on pasr trains while working as train bag-gageman.	3-03-77	1-29-78	Now active employe.

A38

No. 83-1399

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

MARSHALL L. PECINA,

Petitioner,

VS.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY and BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT SANTA FE'S BRIEF IN OPPOSITION

Respondent, The Atchison, Topeka and Santa Fe Railway Company (hereinafter "Santa Fe"),[1] respectfully re-

[1] Respondent, The Atchison, Topeka and Santa Fe Railway Company, is a wholly owned subsidiary of Santa Fe Industries, Inc. which is a wholly owned subsidiary of Santa Fe Southern Pacific Corporation. Subsidiaries of respondent which are not wholly owned by it are as follows: Alameda Belt Line, The Oakland Terminal Railway, Oklahoma City Junction Railway Company, St. Joseph Terminal Railroad Company, and Sunset Railway Company.

quests that this Court deny the petition for writ of certiorari seeking review of the Tenth Circuit's opinion in this case.

STATEMENT OF THE CASE

Facts

Petitioner, Marshall L. Pecina was employed by respondent, Santa Fe, as a crew clerk in Kansas City, Kansas, and in this capacity was responsible for assigning engineers, firemen and hostlers to work on trains and locomotives in and around Kansas City. He was represented for collective bargaining purposes by the Brotherhood of Railway, Airline and Steamship Clerks.

In June, 1974, Santa Fe decided to abolish a job petitioner happened to be working because it required only a few hours work each day. After Santa Fe advised petitioner of its plans in this regard, he complained through his union. In response thereto, the position abolishment was postponed. Petitioner also filed a charge of discrimination with the EEOC claiming that Santa Fe was eliminating the job in retaliation for petitioner's civil rights activities, although Santa Fe was not served with a copy of the charge until after it postponed the abolishment. When the position ultimately was eliminated in December, 1974, petitioner exercised his seniority and acquired a similar crew clerk position with the same pay and hours. He suffered no injury as a result of the job abolishment and remained continuously in Santa Fe's employ as a crew clerk until 1977, despite having been involved during the interim in several confrontations with other employees for which he could have been but was not removed from service.

In July, 1977, petitioner's brother, Don Pecina, was hired by Santa Fe as a fireman and thereafter was in a position to be assigned by petitioner to various fireman and hostler

jobs. During the summer of 1977, several Santa Fe firemen noticed that Don Pecina appeared to be working jobs they believed they were entitled to by virtue of their greater seniority. Eventually, these employees complained to respondent and their union representatives that petitioner was improperly favoring his brother in making assignments and had been abusive and crude with them and their families on the telephone.

At the behest of the firemen and their union, Santa Fe conducted a preliminary investigation into the allegations of impropriety on petitioner's part. The results of the company's inquiry indicated that when petitioner had been on duty, his brother Don had been called and paid for four lucrative, yet unnecessary, fireman jobs on Don's rest days from his regular hostler job and when Don's seniority would not permit him to work as a fireman. A formal disciplinary investigation into the matter was then held at which petitioner was present, was given the opportunity to testify, produce evidence, cross-examine witnesses, and he did so. This proceeding lasted ten to twelve hours and generated a transcript of one hundred, twenty-two pages, plus exhibits.

After reviewing the evidence adduced, respondent's Superintendent concluded that petitioner and his brother had been engaged in a scheme to provide Don Pecina extra money. The Superintendent founded his decision concerning petitioner on a specific day on which his wrongdoing was indisputable and on the basis of which his discipline clearly would be sustained in arbitration. However, contrary to the statement in the petition (p. 3), petitioner never was exonerated for the other three days; the record below includes the consistent testimony of Santa Fe management that they became convinced the Pecina brothers were engaged in an ongoing scheme to collect money, but they based their disciplinary decision with respect to petitioner on a day when

the case against him was so clear they were confident it would be upheld in arbitration.

Immediately following his discharge, petitioner filed another charge of discrimination claiming retaliation and discrimination based on his termination. He also filed a grievance under the collective bargaining agreement.

During discussions between Santa Fe, petitioner and his union representatives regarding the grievance, management agreed to allow petitioner to return to work without back pay but subject to a restriction that he no longer work in the crew clerk's office. It was also agreed, however, that petitioner would be free to pursue through appeal procedures under the union agreement his claim for back pay and his claim to remove the restriction against his working in the crew clerk's office. Moreover, petitioner was not required to relinquish his claims under any civil rights laws. Petitioner repudiated this agreement despite the availability at the time of other jobs at the same location with wages, hours and working conditions comparable to or better than the crew clerk position he had previously held. Subsequently, petitioner's grievance was submitted for resolution through Railway Labor Act arbitral processes and, on December 14, 1979, was denied by the National Railroad Adjustment Board.

Proceedings Below

After he received a right to sue letter from the EEOC, petitioner brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, against Santa Fe and his union alleging retaliation and national origin discrimination. The case proceeded to trial in the United States District Court for the District of Kansas. Thereafter, the district court entered judgment based on a thorough but unpublished Memorandum and Order, reproduced as

Appendix B to the petition for certiorari. The court held that petitioner had failed to establish either a prima facie case of retaliation, because he did not prove any casual connection between his civil rights activity and his discharge, or a prima facie case of national origin discrimination, since he did not prove he remained qualified for his job. Alternatively, the court concluded that, even if petitioner had estabilshed a prima facie case, he did not prove that Santa Fe's reason for his discharge, *i.e.*, that he had engaged in a scheme to obtain money from his employer, was merely a pretext for retaliation or national origin discriminaton.

Petitioner appealed from the district court's decision to the United States Court of Appeals for the Tenth Circuit. After receiving the parties' briefs and hearing oral argument, the court of appeals affirmed the district court's decision. In an unpublished opinion, reproduced as Appendix A to the petition, the Tenth Circuit ruled the record disclosed no reason to conclude petitioner had carried his ultimate burden to persuade the trier of fact that respondent intentionally and unlawfully discriminated or retaliated against him.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Decision Below Does Not Establish A Standard Of Proof In Conflict With that Established In Any Other Circuit Or By This Court.

Petitioner has attempted to raise some conflict among decisions of the federal apellate courts, apparently regarding the order and burden of proof in disparate treatment cases under Title VII. In particular, petitioner argues that a new standard of proof was established below to the effect that a Title VII plaintiff must always produce evidence that another employee in "an identical situation" was treated less severely in order to show the employer's

stated reason for terminating him was pretextual. Pet. 5-7. Petitioner's assertions in this respect mischaracterize the lower courts' opinions.

It is clear that both the appellate and district courts scrupulously adhered to the framework for allocating the order and burden of proof in Title VII cases which this Court developed in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and refined in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), and *United States Postal Service Bd. of Govs.* v. *Aikens*, 460 U.S., 103 S. Ct. 1478 (1983). Moreover, the courts below simply did not require petitioner to present "an identical situation". Neither court expressly or implicitly held that pretext for discrimination can never be established absent evidence that an employee in exactly the same situation as plaintiff was treated by the employer in a more lenient fashion.

To the contrary, the courts simply analyzed the evidence produced by plaintiff to determine whether it showed the articulated reason for petitioner's discharge was a pretext for discrimination or retaliation. The courts below agreed that the offenses involved in the disciplinary cases upon which petitioner relied were not comparable to petitioner's willful plan to defraud the company,[2] while the

[2] As the lower courts noted, there was ample evidence on the record to reach this decision. Indeed, the particularly calculated nature of petitioner's scheme, the broad impact it had on respondent's already volatile relations with other employees and unions, and the substantial pecuniary cost to respondent in the form of "time claims" filed by firemen denied jobs to which their seniority entitled them, all contributed to the especially serious nature of petitioner's offense. Given also that petitioner had once before been discharged for dishonest conduct (cashing another employee's payroll check), the lower courts hardly erred in concluding that petitioner's conduct was properly deserving of dis-

other discharges for willful misconduct placed in evidence by the employer were more comparable. *Cf. McDonnell Douglas, supra* at 804 (evidence that white employees were involved in acts against the employer of "comparable seriousness" to plaintiff's, but received less severe discipline, may indicate that the employer's articulated reason for disciplining plaintiff was pretextual). In so doing, the court of appeals did not invent any novel standard of proof but only evaluated the evidence in accordance with the standards and procedures laid down by this Court in *McDonnell Douglas, Burdine* and *Aikens, supra.*

Petitioner's conclusory claim that the court of appeals decision conflicts with decisions of other courts is wholly baseless; he has not directed this Court to a single decision from another court of appeals or from this Court which reflects any inconsistency with the ruling below. The conflict which he asserts does not exist.

II. Petitioner Merely Asks This Court to Review Concurrent Findings Of Fact By Two Courts Below.

Petitioner's second argument for certiorari (Pet. 8-9) exposes clearly the true substance of his petition. In the most general of terms, he quarrels again with the conclusion twice reached below that the examples of discipline which he cited at trial to show discrimination or retaliation were not persuasive. In so doing, he again omits reference to the numerous disciplinary cases identified by the employer which demonstrated that white employees found

---

cipline more severe than that issued employees in the instances relied upon by petitioner. In any event, the record disclosed numerous examples of employees who were discharged for willful misappropriation of railroad or shipper property. These latter cases were certainly more "comparable" to petitioner's and indicated that his discipline was not inordinate.

guilty of willful acts of dishonesty, also were discharged, and to the fact that, like others, he was offered reinstatement but he turned it down.

Still, regardless of the specific nature of the evidence adduced below, it is conspicuously apparent that the outcome of this case turned wholly on the evidence presented at trial. No controversial or important questions of federal law were or remain to be resolved.[3] Rather, petitioner seeks one more opportunity to review the evidence presented in his case. That evidence, however, has been thoroughly considered by two federal courts coming to exactly the same conclusion. It is not the function of this Court to review such factual findings. Rather, this Court has repeatedly pronounced that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635 (1967); *Graver Mfg. Co.* v. *Linde Co.,* 336 U.S. 271, 275 (1949). No such showing of very obvious or exceptional factual error has been made by petitioner.

[3] It is significant that neither the district court nor the Tenth Circuit regarded its opinion as possessing enough significance beyond the interests of the parties at bar to be worthy of publication.

CONCLUSION

For the reasons heretofor stated, the petition for writ of certiorari should be denied with costs allowed to respondent.

Respectfully submitted,

RONALD A. LANE
(Counsel of Record)
JOHN J. FLEPS
80 East Jackson Boulevard
Chicago, Illinois 60604

ROTH A. GATEWOOD
109 West Ninth Street
Topeka, Kansas 66612

Counsel for Respondent
The Atchison, Topeka and
Santa Fe Railway Company